PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 70

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1959
CERTIORARI GRANTED APRIL 18, 1960

Supreme Court of the United States

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THEODORE GREEN, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Monday of September in the year of our Lord one thousand nine hundred and fifty-two.

INDICTMENT—Returned September 29, 1952

COUNT ONE:

The Grand Jury for the United States of America, within and for the District of Massachusetts, upon its oath, charges that

THEODORE GREEN, alias
Theodore Georgacopolos,

of Boston,

DAVID S. JACOBANIS, alias
Jack Nelson and John Nelson,

of Needham,

MARCO ANTONIO ROCCAFORTE, alias
Anthony Rockford,

of Boston,

all in the District of Massachusetts, on or about September 13, 1951, at Norwood, in the District of Massachusetts, did enter a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, to wit, the Norwood Bank and Banking Company, with intent to commit in said Bank a Felony affecting said bank and in violation of Title 18, Section 2113(a) of the United States Code, to wit, for the purpose of robbing said bank; in violation of Title 18, Section 2113(a) of the United States Code.

COUNT TWO:

The Grand Jury further charges that

THEODORE GREEN, alias
Theodore Georgacopolos,

of Boston,

DAVID S. JACOBANIS, alias
Jack Nelson and John Nelson,

of Needham,

MARCO ANTONIO ROCCAFORTE, alias
Anthony Rockford,

of Boston,

all in the District of Massachusetts, on or about Septem- [fol. 2] ber 13, 1951, at Norwood, in the District of Massachusetts, did, by force and violence and by intimidation, take from the presence of others certain property and money and other things of value belonging to, and in the care, custody, control, management, and possession of a bank; to wit, certain property and money and other things of value belonging to and in the care, custody, control, management, and possession of the Norwood Bank and Banking Company, the deposits of which company were insured by the Federal Deposit Insurance Company; in violation of Title 18, Section 2113(a) of the United States Code.

COUNT THREE:

The Grand Jury further charges that

THEODORE GREEN, alias
Theodore Georgacopolos,

of Boston,

DAVID S. JACOBANI, alias
Jack Nelson and John Nelson,

of Needham,

MARCO ANTONIO ROCCAFORTE, alias
Anthony Rockford,

of Boston,

all in the District of Massachusetts, on or about September 13, 1951, at Norwood, in the District of Massachusetts, did, in committing the offense of robbery of a bank,

as defined in Title 18, Section 2113(a) of the United States Code, to wit, robbery in the Norwood Bank and Banking Company, the deposits of which company were insured by the Federal Deposit Insurance Corporation, assault certain persons and put in jeopardy the lives of certain persons in said bank by the use of a dangerous weapon and device; all in violation of title 18, Section 2113(d) of the United States Code.

[fol. 3] A TRUE BILL.

s/ Elliot C. Laidlaw
Foreman of the Grand Jury.

s/ Edward D. Hassan
Asst. United States Attorney for the
District of Massachusetts

DISTRICT OF MASSACHUSETTS, Sept. 29, 1952

Returned into the District Court by the Grand Jurors and filed.

s/ Joseph J. Duwan
Deputy Clerk

[fol. 4] • • •

[fol. 5] • • •

[fol. 6]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Transcript of Hearing

Court Room No. 3, Federal Building,
Boston, Massachusetts.
Monday, October 27, 1952,
11:25 a.m.

The Court: I suppose I ought to hear you first, Mr. Callahan, on this motion for a new trial, motion for arrest of judgment.

Mr. Callahan: Well, I would suggest, if your Honor please, that I be heard, first, on the motion on arrest of judgment.

The Court: All right. Use your own order.

Mr. Callahan: Well, Judge, this case went to the jury on three counts. Count No. 1 alleged that the defendant Green entered this bank with the intent to commit a felony. Count No. 2 alleged that he robbed the bank. And Count No. 3 alleged that he robbed the bank, putting people in fear by use of a dangerous weapon.

Now the jury returned a verdict of guilty on the three counts. So that until the verdict of guilty was returned on the third count, why, the defendant Green was in a position where he could not plead that conviction as a double jeopardy. So having convicted him on the third count, why, we argue to your Honor that that conviction on the third count was a jeopardy and that he could not be convicted on the first and second counts because under the Rules of Criminal Procedure in this Court, Rule 31 says that the defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Of course, I submit that if a man is found guilty of robbing a bank and putting people in fear in so doing [fol. 7] necessarily that conviction includes entering the bank with the intent to commit a felony and includes

robbing the bank also. There is no question at all, I submit, that if that was the situation before this trial began, if before this trial began there was a conviction on this third count outstanding, namely, that Green did rob the bank and put people in fear, that conviction could be pleaded as a jeopardy to an indictment alleging that he entered the bank, an indictment that alleged that he robbed the bank. And, of course, it was impossible, as I said in the beginning, for the defendant to take advantage of the Fifth Amendment of the Constitution until the jury either had acquitted or convicted, and, of course they didn't know, they didn't do that until they came in with their verdict on the three counts. And the only way it suggested itself to me to bring that matter before the Court in a legal way is to make a motion in arrest of judgment. Consequently the motion has been filed asking for that judgment to be arrested on Count No. 1 and Count No. 2 and assigning as reasons therefor, first, that on the record this Court is without jurisdiction of the offense set out in said count because said offense was embraced and included in the offense alleged in Count No. 3 of said indictment on which last count, Count No. 3, he, the said Theodore Green, was convicted by a jury in this Court on said date, and, two, that to impose judgment and sentence on said Count No. 1 constituted double jeopardy and punishment in violation of the Fifth Amendment of the Constitution of the United States.

The same applies to Count 2, which is also included in the Motion to Dismiss and Arrest of Judgment.

I feel sure, Judge, that there are a number of cases that suport the contention of double jeopardy and, of course, the double jeopardy also includes double punishment. That briefly sets out the reasons for the motion for arrest of judgment.

[fol. 8] The Court: Have you filed any motions, Mr. Juggins?

Mr. Juggins: No. I had in mind to follow Mr. Callahan along that same thought, not probably agreeing with all suggestions made but with some thoughts of my own, I would do so. My idea about that phase of it would be that, reading back to the time that the original motion was filed, to strike out Count 1, your Honor at that time

thought that that might await evidence which might be offered later, which would indicate that Count 1 and Count 2 did not necessarily conflict one with the other. In other words, that the charge of entering a bank with intent to commit a felony and the robbing of a bank might well mean that the bank might be robbed outside of the bank itself and there would be no conflict in the two counts. Actually, as the evidence developed—

The Court: That would rather prove they are two separate offenses—entering the bank with intent to rob and robbing it, separate offenses.

Mr. Juggins: Yes, your Honor.

The Court: Not so with respect to Count 3. Count 3 is laid as an aggravation of Count 2, actually robbing the bank. That is not a separate offense that we discussed during the trial.

Mr. Juggins: Well, if the third count, that of an aggravation of the robbery by the use of a weapon, that is inclusive again of Count 2 and, of course, of Count 1.

The thought strikes me, if there is a sentence on the three counts, as found by the jury, that is Count 1 of entering the bank, Count 2 of the robbery, and Count 3 robbery with aggravation, we have in effect three different offenses instead of the one set forth in Count 3. If that were so, it seems to me we have a repetition of offenses, and I am concerned as to how a disposition should be made of the three—the fact three counts have [fol. 9] been decided by the jury to have warranted a conviction. That is the first thought I had.

Necessarily, if sentence is imposed on Count 3, we have a question of disposition on Count 2 and—

The Court: Well, it might seem that Count 2 might be merged into Count 3, because Count 3 is an aggravation of Count 2. But the indictment isn't laid so that there is an aggravation with respect to Count 1, which is a separate offense. I thought I would point that out to you.

Mr. Juggins: My thought would be it must be an aggravation if Count 2 is inclusive of Count 1.

The Court: That might be so, Mr. Juggins, if Count 1 was included in Count 2. But I think a great many of the cases that reviewed this particular bank robbery stat-

ute have said that Count 1 and Court 2 are separate offenses.

Mr. Juggins: There is one case that I—

The Court: I have a very practical method of dealing with the question of double jeopardy, if there is anything in what Mr. Callahan says, which I will display later, I hope.

Mr. Juggins: I had a case. I am assuming your Honor has made a thorough examination of the case.

The Court: I have made an examination of it, of course.

Mr. Juggins: I had in mind citing, if I might, your Honor, the case of Wilson against the United States, 145 Fed. 2d 734, and that has a quotation in it, in a situation where the defendant pleaded guilty to both counts. That is, Count 1 was based on the old section, 588, which is 2113 in the modern version of it, and Count 2. The defendant had pleaded guilty on both counts and was sentenced to serve a year to six months on each count to run consecutively. It was later vacated and the defendant was sentenced to seven years and six months on Count 1, two years and six months on Count 2, the sentence to run consecutively. And the court, I am quoting now, said:

[fol. 10] "Subsection (b), as we construe it, does not define an offense distinct from the offense defined in subsection (a). It does prescribe minimum and maximum penalties for an aggravated form of the offense defined in subseciton (a). These penalties are in lieu of, and not in addition to, those prescribed in subsection (a).

It is clear, therefore, that counts 1 and 2 charged a single offense. Since count 2 charged aggravating circumstances and count 1 did not, appellant should have been sentenced on count 2 and should not have been sentenced on count 1.

The sentence on count 1 was invalid for reasons just stated."

There they have taken the position sentence should be solely on Count 2. Well, then the thought occurs to me: What are they going to do with Count 1? There has been

a conviction here. The defendant had pleaded guilty. Yet the jury have found on a separate charge, in an indictment charging a distinct offense, have found this defendant guilty. Notwithstanding that the second count might be inclusive of the first count. That was the count I suggested to your Honor should be stricken in the first instance because it was inclusive.

Mr. Callahan: Could I say one more word, Judge?

The Court: Yes.

Mr. Callanan: These counts, Judge, as drawn are not drawn as different descriptions of the same act but they are drawn as specific offenses, so that I would suggest to your Honor that in that state of the indictment, why, it couldn't be cured by imposing a sentence on the whole indictment; it couldn't be cured by imposing a sentence on Count 3 and sentences on Counts 1 and 2 to run concurrently with Count 3.

That would be true if the counts were drawn and al- [fol. 11] leged to be different descriptions of the same crime. They haven't done that here. They have drawn their counts, each count setting out a specific crime.

The conviction on Count 3 is a jeopardy to those other two counts. So, I submit that the defendant Green is entitled to have his motion in arrest of judgment allowed.

The Court: Motion for a new trial and the motion for arrest of judgment are denied.

Mr. District Attorney, I will hear you on sentence.

Mr. Hassan: May it please the Court, may I first address my remarks to the defendant Green. This defendant is thirty-five years of age, married, and has two children. He has been at odds with the law since his juvenile days. He has gone from bad to worse. His family life has been one for which he could personally accept no credit. He has allowed his wife and children to become objects of charity and welfare over a period of many years while he has been roaming throughout the country in an endeavor to get by on his wits.

He is well known to the police of Boston as a criminal, a man who would stop at nothing in order to obtain his ends.

He has served many years in Houses of Correction, Reformatories, and the State Prison.

It is my opinion that in these days when it is hard to pick up a newspaper without finding where somebody has been held up at the point of a pistol that we most certainly should make an example of this type of criminal who comes before this Court. We also should do what we possibly could to have the sentence act as a deterrent toward men who might be of the same ilk as Green. In my opinion he's a killer. He is wanted in other bank robberies now. I have been advised he is wanted down in Maine for a bank robbery, which he and the defendant Jacobanis were engaged in at the Westport Bank of Maine.

He has had little or no occupation. As a matter of [fol. 12] fact, during the days he did work his family received absolutely no benefit from it. The probation report indicates he says he has been a costume jewelry salesman. The investigation which the Federal Bureau of Investigation conducted in this case clearly shows there isn't a bit of truth in it.

He is now doing a sentence of 15½ to 20 years in State Prison. I don't believe there is any hope for rehabilitation in this case. I think it is our plain duty to see to it that men of this type are kept out of circulation.

As to the defendant Green, I am going to recommend for your Honor's consideration that he be sentenced to serve a term of 25 years in an institution to be designated by the Attorney General, and that this sentence commence at the expiration of the sentence which he is now serving under the State authorities.

The defendant Jacobanis is 42 years of age, was recently married, and has one child. He is an alien. He has been in trouble from the time he was thirteen. He grew up in a section of the City where I live and have lived for many, many years. I know something personal about his juvenile days. He was sentenced to the Lyman School when just a boy.

I may have my figures wrong, but in looking over the Probation Report and also the FBI Report, he has served approximately 22 years of his life in institutions of various kinds. Something that the report does not reflect too strongly is that even when he was sentenced, on

one of his sentences to State Prison, he was placed in solitary for a long period of time as a result of a vicious assault which he committed on a fellow inmate, and on another occasion he was placed in solitary by reason of the fact he attempted to escape.

In 1940 he was sentenced to serve a term for armed robbery of 10 to 15 years in State Prison. He got out [fol. 13] in 1950 and got a job at the Hunt-Spiller Company in South Boston. The Probation Report says that he worked from December of 1950 until December 12 of 1951. That, of course, is a typographical error because, of course, the record shows he gave up his job on September 12. As a matter of fact, his parole ended on August 30 or 31.

Our investigation shows that the only reason why he worked at Hunt-Spiller was because he was on parole, that he stated he felt he was just doing an added year of hard labor, and just as soon as he had the opportunity to get off parole he gave up that job.

He is a cool, cold, calculating individual, very quiet, apparently very mild-mannered, and yet back of it all he too is a vicious criminal, another killer.

But for the grace of God there may have been some killing at the Norwood Bank. This Mrs. Kalliel, who attempted to leave the bank, was pushed down into a chair by the defendant Green, and a gun stuck in her ribs.

I feel that the maximum sentence should be imposed on both of these men. I do not believe that there is any chance of rehabilitation. And I think we should make certain that at least for a long, long period the public will have just two less to worry about. And, therefore, I recommend for your Honor's consideration as to the defendant Jacobanis that he, too, be sentenced to serve a term of 25 years in an institution to be designated by the Attorney General.

Mr. Callahan: If your Honor please, of course we didn't argue the motion for a new trial. Your Honor has already ruled on that.

The Court: I would be glad to hear you. I thought you waived any argument on that. I may be wrong. I would be glad to hear you. Maybe I acted a little too hurriedly. I will hear you on the motion for a new trial, if you wish.

Mr. Callahan: If your Honor please, it was said to the [fol. 14] jury in substance, as attorney for the defendant Green, We are not so much concerned with the question as to whether he is guilty of this crime or not as we are on the issue as to whether the government proved it by credible evidence. Now there cannot be any question that on the early afternoon of September 13, two men went into the Norwood Bank and stole money that they left there and made a getaway so-called in an automobile.

The automobile was identified as an automobile of a certain number, and it was found that it had been stolen earlier that day out at Milton, I think, and had been returned sometime before 4 o'clock that afternoon.

There were a number of witnesses brought in here from the bank, employees and customers, and people who were in the vicinity, and none of those witnesses could identify the two robbers, identify the two robbers so-called, except in a very general way to say that one was a thin man and one was a fat man, one was a man that weighed about 200 pounds.

So that the government's case as it went to the jury depended entirely on the evidence of two, we might call them, State witnesses, namely; Roccoforte and the testimony of Bistany.

I submit that there was absolutely no legal corroboration of either of those witnesses' testimony. Roccoforte testified in substance that he had stolen a car, that the car was used, according to him, or turned over to him—to Green and Jacobanis, and that later that day he got a telephone call from Green, Green telling him that he was out there in the woods and he couldn't leave there until dark because there was a road block thrown up by the police to apprehend them.

Well, of course, necessarily that couldn't have been so because on this evidence if the Oldsmobile that has been identified in this case was the Oldsmobile that was used [fol. 15] that Oldsmobile was returned to the parties sometime before four o'clock. And the witness Roccoforte spoke about or testified that the night before this September 13 incident, why, he with Green had stolen another car, and that they were stopped by some police officers. Certainly that hasn't been corroborated.

Of course, I can't take up your Honor's time arguing that because you probably have read the results of that investigation as well as myself. So that you have got at least two instances where it has been demonstrated that the defendant Roccoforte was not telling the truth.

Bistany testified that on one occasion down in Pawtucket that Green told him that they had gone to some place in Milton, I think he said, where they remained, and that then they went to Pawtucket, and after going to Pawtucket they went back to Boston.

Well, of course, that can't be so, if this Oldsmobile, that has been the subject of evidence here, is the Oldsmobile that was used—because to repeat again, the evidence showed that the Oldsmobile was returned to the parking space sometime before 4 o'clock.

So that the government's case, I submit, depended entirely on the testimony of those two witnesses uncorroborated in any respect. And you have the defendant Roccoforte admitting that he planned this robbery, admitting that he stole the car that was or could be said to be used in the robbery, that he apparently knew what went on in the bank, and he knew what went on in the course of the getaway after the robbery.

And he fits the needed description that was given by the witnesses of the bank as the man who jumped over the counter. And the testimony was that that man had a shiny revolver in his hand. And if you go back to Bistany's testimony, Roccoforte owned a revolver at about [fol. 16] that time that answers the description of the revolver in the hand of the man that jumped over the counter.

And to top that, he comes into court here and he pleads guilty to the robbery. And it was argued to the jury that the fact that he knew that this Mrs. Kalliel, if that is the name, was pushed down, and the fact that he knew that the car almost hit a baby carriage as it was making its getaway, that that was some corroboration of the testimony. I don't have to argue to your Honor that that wasn't legal corroboration.

He could know those things and it is logical that he knew them because he was present there at the time and that he was one of the men who took part in this robbery.

And who says that he wasn't? The only one that says that he was not is himself. That's all. There are no witnesses who were there at the bank who were asked to look over Roccoforte. And strange to say, there were no witnesses at the bank or in the vicinity of the bank that were ever asked to look over these two defendants.

And we have got the situation of where there are at least eight or nine witnesses who are present when a robbery is committed and when suspects are picked up for that robbery, not one of those witnesses are ever brought down to confront the men to see whether they could identify them. So that we have got the situation that it can well be argued that Mr. Roccoforte was one of those men that went into that bank and on the evidence was the man who jumped over the counter, because he fits the meager description of that man who jumped over the counter.

On the evidence there were two men who went into that bank. Well, if Roccoforte is one of them, who was the other? The other man, the man who is supposed to have stood out in the lobby, is described as a fat man, a man that weighed 200 pounds. Well, certainly the defendant Green doesn't fit that description.

[fol. 17] Now in addition to that there was a mass of evidence that went in here that was prejudicial to the defendant Green. The fact that he met Roccoforte while both were doing a State Prison sentence, the fact that Bistany testified against him up in the Worcester Court—extremely prejudicial evidence to present to a jury.

And your Honor will recall that except for the testimony of Roccoforte that he had this telephone conversation with Green, stating that Green couldn't get away, when we know that that could not have been so, and as a result of that went down and got a package containing money from Mrs. Green—absolutely no corroboration of that on this evidence.

So that as you examine and analyze the evidence you are driven to the conclusion, in order to convict here the jury must have taken Roccoforte's testimony a hundred per cent.

Now I am not going to argue to your Honor that the law in this court is that an accomplice must be corroborated, but I argue to your Honor that the cases say that

the better practice is for the court to instruct the jury that they are to consider whether there was corroboration or not.

The Court: I told the jury that.

Mr. Callahan: Well, your Honor didn't give the instruction that was asked.

The Court: No. I agree. I didn't give the one that was asked because I was asked to instruct the jury that the evidence of the accomplice needed corroboration, which wasn't so. I instructed the jury they should give such testimony utmost scrutiny, and it would be well to look around—they didn't have to—but it would be well to look around for corroborating testimony.

Mr. Callahan: So that there was the issue, as I submit, for the jury as to whether they were going to believe [fol. 18] Roccoforte's testimony or not. The testimony of Bistany was absolutely uncorroborated.

And if it has come to the time when a man who takes part in a robbery can come in and relate facts that point to him being a party to the robbery and simply say, "Well, I know part of this because I heard it," as he says, "because he, Green, told me about it," I submit that it's pretty tenuous evidence on which to convict a man of a serious crime.

This case took, as I recall it, some eight days to try. The jury came to a conclusion here in a matter of an hour and a half. I don't argue to your Honor that a jury has got to waste time. I suggest to your Honor that the verdict was brought in in a pretty short space of time, considering the important issues that were at stake here.

There are other pieces of evidence that were testified to by Roccoforte that, of course, must stand because the defendants were not in a position to produce the evidence to contradict it at that time. I haven't, of course, made a motion for a new trial on the ground of newly discovered evidence, so I won't take up your Honor's time arguing that phase of the case.

I have filed a motion for a new trial, and I have set out a number of reasons why we feel that this verdict should be set aside. I have also filed a motion for a ruling of law on the motion for the new trial.

Your Honor has indicated what your attitude is on those motions. I won't take up your time unnecessarily arguing further.

Mr. Juggins: May it please your Honor, on the motion for a new trial, as I have it in mind, it should be directed to the question of whether or not the findings of the jury were warranted or whether or not the weight of the evidence did warrant their findings. As the case progressed, your Honor, I think your Honor would be inclined to [fol. 19] agree with counsel for these defendants that up to the time that Mr. Roccoforte and Mr. Bistany took the witness stand that the government had failed entirely to connect either Green or Jacobanis with this robbery, that not one of the many witnesses advanced were able to identify even one or either one of the defendants and, therefore, I think we would have been justified as counsel for these defendants up to that time to say that the government had not been able to maintain its allegations.

And then Roccoforte was produced, an accomplice according to his own story, a man who had admitted and pleaded guilty to this offense, and the government is obliged to rely on the testimony of an accomplice and a man named Bistany.

Bistany I can dispose of in a few words. I feel warranted in saying that if Bistany were the only one who testified and not Roccoforte that your Honor would not have felt warranted in believing Bistany's testimony. I can't for the life of me see how anyone could give any credence at all to that type of person, and I dispose of him in that manner.

Mr. Callahan has called your Honor's attention to the many conflicting statements made in Roccoforte's testimony. I have the feeling that Roccoforte had a reason for testifying here. He expected leniency as a result of that testimony. And under those circumstances it might well be he would exaggerate and distort evidence for the purpose of accomplishing a certain result, and that is the conviction of these two men.

I have in mind a story told by Roccoforte that he went out to saw wood, and an intimation or inference might have been drawn from the story as to the circumstances under which he first went to Norwood, that he

went out there with the intention in the first instance of casing, as they have called it, this Norwood bank. I felt [fol. 20] as the story unfolded that he went out there to avoid apprehension on a matter that was pending in Maine where some offense was committed up there and for which he has since been doing time and of which he has been convicted. That while he was out there he looked over other places to consider whether or not they could take—that he or whoever might be joined with him would take a favorable view—whether or not they ought to be attacked so-to-speak. That he looked at the Grant concern, an incidentally he looked at the Norwood Bank.

And at that time an interesting phase occurred that I think suggested a clear question to him, when I asked him, that if while he was at Norwood looking over these different places, if it wasn't his thought at that time to participate in person with any attack made at those several places he looked at, and he admitted that he did have that in mind, that he was going to actively participate in any effort made to rob any place at Norwood or those places which he looked over.

And that seemed to me a bit inconsistent with his story, as he told it here. The night before, and apparently for some few days before this time, there had been some suggestion or some thought in his mind at least that this bank should be robbed, and Roccoforte is primarily in the midst of that discussion for that purpose. And he tells about, as far as Jacobanis is concerned, he met him about a week before, and he tells that he met him in the morning a week before at Sullivan Square. I think the record showed actually that Jacobanis was at work at the Hunt-Spiller Company on that particular morning.

And then just the day before that robbery, September 13, he was again meeting Jacobanis on September 12, another day that Jacobanis was working.

Well, those inconsistencies in his story are such that I submit they go to his credibility. But to follow the [fol. 21] thought that I think Mr. Callahan has advanced as to whether or not Roccoforte went so far as to take a position here, that he had no activity in the participation of this robbery, here is a man, Roccoforte, that the day before, and we know something about this—we can gather.

something about his background—he says that he stole a car, that car to be used in the perpetration of this robbery, that he did not succeed in getting that car that day, and repeated the effort the next day. This man who at the time he was at Norwood was going to actively participate in a robbery steals a car the next day, and drives it as far as Roslindale, and then says that he stopped there and got out and left the place.

Well, it's hard to conceive of a man who had in mind some time back he was going to actively participate in this robbery, who participated in the arrangements made to carry out that purpose, who attempted to steal a car to carry out the purpose on the day before the robbery is committed, and on the very day that the robbery took place he takes part in the stealing of a car and then drives it out part-way, within ten or fifteen minutes drive or ride to Norwood, and then he gets out.

Now the time for him to have gotten out, if he didn't intend to participate actively in this robbery, was about the time that they got the car. No. He proceeds along towards Norwood, stops at a filling station to get gas—an opportunity to stop there at Roslindale. Then he tells that he got out. Well, it's strange that at the last moment he says that there was no need of three men participating, that it was only a two-man job, and he gets out of the picture.

Did Roccoforte actually participate in that robbery? Certainly a man who is willing to participate in a robbery of the type that he is—it's a rather peculiar thing that at the last moment he should change his mind about it while [fol. 22] on the way to the place where the robbery was finally committed.

His conscience, of course, didn't bother him. He had the nerve to do it, because we know the type, and yet he says he didn't participate.

Now in a motion of this sort, of course Mr. Callahan or myself have no other thought but to see that the defendants are entitled to a trial, a fair trial, that the evidence which should warrant a conviction is the kind of evidence that is credible and would warrant a conviction. Here, I think, if we are going to rely on that type of

testimony we have got to the point where certainly the weight of the evidence is not in favor of the government.

The Court: Did you want to say something?

Mr. Callahan: Yes, sir. Judge, the defendant Green is now 37 years of age, was born and lived in Boston all his life, and has been married since 1937. In 1949, while over at State Prison, while at work he fell, I think, three floors with the result that he injured his left arm. I think he was hospitalized over there for almost two years.

He was sent to the Massachusetts General Hospital for treatment, and when he was released from State Prison, why, he was not in condition to go to work, with the result that his family did get State Aid, but it was because at that time, why, he was physically incapacitated to work.

His occupation just prior to his arrest on these offenses, he was a partner in a Syrian Club down in the South End. He informs me that he took care of his family since he got through or recovered from the injury to his arm. Even now his left arm is practically helpless.

Now on October 2, about four weeks ago, Green was sentenced in the Worcester Superior Court, the State Court, to 15½ years to 20 years, which sentence he is now doing over at State Prison. He is also under indictment, I think, in this Court for robbery of the Medford [fol. 23] Bank, the Middlesex County Trust Company. He is also indicted up in Maine for robbery of a bank up in Maine, and there are indictments pending against him, one in the Norfolk Superior Court, the State court, on this Norwood Bank robbery; and there is also an indictment pending against him over in Middlesex County for robbery of the Middlesex County Bank.

So that any sentence that is imposed on Green in this Court at this time automatically is going to prevent his chance of getting any parole on the State Court sentence of 15½ to 20 years until he has practically done his minimum time minus any good time allowed him.

So, your Honor can see Mr. Green has quite a long road ahead of him. He is now doing somewhere in the vicinity of 15 years in the State court before he starts to do any time on whatever sentence your Honor may

impose. If he is convicted of any of these other offenses undoubtedly he will get time on those.

So that to repeat again, why, Mr. Green is going to be under lock and key for a good many years, so many years that by the time he does get out, why, all the fire will be out of him and there will be no expectancy that he could be in condition to take part in any other robberies or any other offenses as far as that goes.

So I ask your Honor, while I agree with the fact he has other offenses pending that might result in sentence, decisive on any disposition you may make, I ask your Honor to consider that in determining just what disposition you are going to make of Green's case. He has got two children, one fourteen years of age, one nine years of age. He has got a wife. Notwithstanding what the District Attorney has said, he informed me he has supported them, except for the time he was incapacitated, when they were getting State Aid, because he could not work.

Mr. Green, 37 years of age, has a long road to travel. [fol. 24] I ask your Honor to be as lenient in your disposition as you feel your duty to the public requires.

Mr. Juggins: May it please your Honor, as the government attorney has stated, Jacobanis is 42 years of age, is married, has a child four or five weeks old. I suppose that the result here hardly warrants my stressing much the fact that he is married, and no question can arise but what he was devoted to his wife.

He went to State Prison in 1940. He served 10 years there. From the time he got out—about the time he went to work, 1949, in December at the Hunt-Spiller Company, the work he performed there was arduous, heavy manual labor. He worked there steadily, your Honor, from December. The only time he was out during that period from December up to September 12, 1951, was when there was a strike, a two or three-week period at the factory or plant, and another occasion when he was out, I think, a week.

During that time he apparently comported himself so far as working and applying himself to the work with regularity, saving what money he could.

Of course, as he would admit, no question about it, he took part in other avocations. He gambled, booking or whatever to augment whatever income he could derive. Then in September of 1951 he became involved, according to the story here, with Roccoforte. He is 42. It is a fact there is an indictment or complaint of some sort pending against him with reference to an offense committed in Maine. I am not aware of any other indictments or complaints otherwise pending against him.

I want to argue the Maine proposition from two viewpoints. One is that if it is advanced to show the type of man that he is or the character that he is, it is unfair to anticipate the result of the trial of that offense up there. He might well be found Not Guilty. Therefore, I doubt [fol. 25] if your Honor would give too much consideration to the fact that there is an indictment pending against him up there.

I realize that it is a rather serious offense on which he has been convicted. Not unlike Mr. Green, of course, who hasn't any other matters pending against him, where there has been a conviction, I think he started out when he got out of State Prison to do a really good job. I heard from the clergyman who was here, with whom apparently he was on good terms, and the clergyman put himself out to volunteer to come forward to say that there was a chance for rehabilitation of this man. Of course, substantial sentence means he would be confined for some years and never have the opportunity of seeing his child grow. He will have lost the companionship of a devoted wife during that time.

It might appear to be appealing to your Honor's sentiment. It isn't that thought. It's a practical situation. It's part of his punishment, one that I think your Honor might well take into consideration.

Under those circumstances—your Honor is a just and, I might add, a lenient man. I think your Honor has a full and complete view of this man, his environment, his prospects of what he would be if he got a long, long sentence, and what the result would be indirectly. And all I can suggest to your Honor is to give that phase of it your consideration.

The Court: Well, with respect to the motion for a new trial, which I agreed to reconsider in the light that counsel wanted to argue the case, where I thought, not having said anything about that motion, they had waived it. Mr. Juggins points out the type of testimony in the trial, the testimony of Roccoforte and Bistany, two men with long term criminal records, Bistany going back to Sing Sing for the rest of his life and the other man up in jail in Maine. But as the District Attorney argued, the govern- [fol. 26] ment must take its testimony, its evidence, where it can find it, and the only place it could find it with respect to these men who pursue this type of industry is among themselves. It's the same old story. It takes a crook to catch a crook. You can't catch them very easily otherwise. Now with respect to the testimony of Bistany and Roccoforte. True, as we all knew at the trial, and as I told the jury, the case was mainly a case of circumstantial evidence, but I very carefully instructed them, of course, that it was of equal dignity with direct evidence. There was some direct evidence on the part of Bistany. The admissions that were made from the mouths of these defendants in my opinion, of course, was direct evidence and more or less corroborative of what Roccoforte testified. Of course his testimony was all circumstantial. As counsel for the defendants know, as carefully as I could I instructed them with respect to the principles that are applicable to circumstantial evidence.

But I, sitting here during the two weeks the case was tried, was convinced that at least Roccoforte was telling the truth. The details that he related convinced me, although I wasn't the finder of fact, that these men had committed that robbery in that bank, the mass of detail he wove into the case, and I think truthfully too. True, he was looking for some sort of revenge because some one of these had overreached him in the Maine job, where he lost the $3500 automobile and Jacobanis, the accused, left him destitute with respect to his defense. But that's the only time—both you men, skilled in the trial of cases on the criminal side of the Court, know that is the only time there comes a rift with respect to these men. These men might have come in here for revenge.

There was some motivating power that put them in here testifying on this stand. I will put one side Bistany's testimony. But Roccoforte's testimony with all [fol. 27] the details with respect to the stolen car, the number of the car, the type of car, and what he did and what these three defendants did, it seemed to me to fit right into the picture, and the jury thought so too. I thought the verdict of the jury was well warranted on the evidence. I think without question of doubt they were warranted in finding these men guilty on the evidence beyond a reasonable doubt.

And for those reasons the motions for a new trial are denied.

Now with respect to the question of sentence, an important matter, these men we have here, gentlemen of the defense, are a menace to society. They are what we call bandits and gunmen. They would not hesitate to kill in the Worcester case. As I understand it, with respect to Green, that man up there was shot through the neck by one of these bandits, either Murray or Green or the other participant. I think you know as well as I do that they would not hesitate to use their guns. They are killers. They are a menace to society.

I agree with the District Attorney that the only protection or deterrent for them so they might reform—they'll never reform. These two mad men will never reform. If they were released from State Prison tomorrow they would go out robbing banks or robbing innocent individuals. I don't say that as a guess. That's exactly what they did. Jacobanis worked over at Hunt-Spiller's while he was on parole, but the minute he was off parole, 12 days later we find him, in my opinion from the evidence, the evidence justified it, in that robbery out there. Green was the same type. He was released—and this man Roccoforte was the same type—he was released from State Prison, and they're right back with these revolvers in their hands ready to kill if somebody got in their way.

They deserve no consideration. They are what I call mad men. The only protection society has got is to wall [Tr. 28] them off, fence them off from society just as long as the Court is able to do it. There isn't one word that can be said in their defense. There is not one word

that can be said, I think properly, that would warrant a Court in believing these men could be rehabilitated.

Their records date back for the years almost without end—30 years back as far as Jacobanis is concerned—1923, and the record of Green goes back to 1931. Serious crimes: Robbery, larceny, breaking and entering, use of guns all over their entire careers.

Mr. Clerk—

[The Court and Clerk confer.]

The Clerk: David Jacobanis and Theodore Green. David Jacobanis, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment 20 years, and on Count 3 of the indictment 25 years; said prison sentence to run concurrent, and you are now placed in the custody of the Attorney General until your sentence be performed. Mr. Marshal, the prisoner is now in your custody under sentence of the Court.

Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court.

[fol. 29] IN UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

(SEAL) No. 52-130 Criminal

UNITED STATES OF AMERICA

v.

THEODORE GREEN

VERDICT, JUDGMENT AND SENTENCE—October 27, 1952

On this 27th day of October, 1952 came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offenses of entering a bank with intent to rob (vio 18 USC s 2113(a)); robbing a bank (vio 18 USC s 2113(a)), and robbing a bank under aggravated circumstances (vio 18 USC, s 2113(d)) as charged[3] in 3 counts in Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] 20 years on Count 1, 20 years on Count 2, and 25 years on Count 3, said prison sentences to run concurrently, to begin upon release of defendant from prison upon sentence now being served by him under order of State Court.

FILED IN CLERKS OFFICE JUN 14 1955

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Francis J. W. Ford,
United States District Judge.

The Court recommends commit to:[6]

JOHN A. CANAVAN,
Clerk.

A True Copy. Certified this 5th day of August 1960.
JOHN A. CANAVAN
Clerk

(By) Eleanor T. Forry
Deputy Clerk.

[fol. 30] IN UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

RETURN BY THE UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS

On October 27, 1952 in the United States District Court at Boston for the District of Massachusetts, United States District Judge Francis J. W. Ford sentenced the within named Defendant THEODORE GREEN to a term herein described.

On May 16, 1955, the sentence imposed by the Massachusetts Superior Court at Worcester, Massachusetts on October 2, 1952, under which the defendant THEODORE

GREEN was confined at the Massachusetts State Prison at Charlestown, Massachusetts was vacated by the Massachusetts Superior Court, and on the same day, I took the said defendant THEODORE GREEN into my custody, by virtue of this Judgment, and recommitted him to the Massachusetts State Prison at Charlestown, Massachusetts in accordance with instructions from the Bureau of Prisons.

Thereafter on June 2, 1955, by written directions of James V. Bennett, Director of the Bureau of Prisons dated May 31, 1955, I took the body of the within defendant THEODORE GREEN from the Massachusetts State Prison at Charlestown, Massachusetts and on June 3, 1955, I delivered him into the custody of the United States Marshal for the District of Columbia for further committment.

s/ Robert H. Beaudreau
United States Marshal
District of Massachusetts

Received THEODORE GREEN from Robert H. Beaudreau, United States Marshal, District of Massachusetts, Boston, Massachusetts this 3rd day of June, 1955, and further committed him over to the custody of the Warden of the United States Penitentiary, Alcatraz Island, California, this 6 day of June, 1955.

CARLTON G. BEALL,
United States Marshal,
District of Columbia

s/ Joseph G. Orito
Deputy U.S. Marshal

[fol. 31] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Cr. No. 52-130

UNITED STATES OF AMERICA

vs

THEODORE GREEN, DEFENDANT

MOTION TO VACATE SENTENCE

(Rule 35, Fed. Rule Crim. Proc.)

Comes now the defendant, Theodore Green, and moves that the sentence imposed in the above entitled case on October 27, 1952, be vacated and set aside for the following reasons, among others, to wit:

1. The judge did not orally pronounce the sentence from the bench.
2. The judge and clerk conferred on the length of the sentence to be imposed out of hearing of the court reporter and the defendant.
3. The judge did not afford the defendant an opportunity to speak before imposition of the sentence as required by Rule 32(a) Fed. Rule Crim. Proc.

The defendant attaches hereto a Memorandum made in support hereof.

WHEREFORE, it is respectfully prayed that the aforesaid sentence be set aside as the law and justice require.

s/ Theodore Green
THEODORE GREEN
Box 1180
Alcatraz, California.

[fol. 32]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 52-130

UNITED STATES OF AMERICA

v.

THEODORE GREEN, ET AL

OPINION—June 15, 1959

ALDRICH, D. J.

This is a motion to vacate sentence under Rule 35 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., the pertinent portion of which is as follows, "The court may correct an illegal sentence at any time." Accompanying the motion was no filing fee, but an affidavit which the clerk construed as being in forma pauperis so as to eliminate the necessity of a filing fee. This affidavit made no reference to the defendant's citizenship. Without instructions from me the clerk filed the motion on the civil side and wrote the defendant that his affidavit was defective because of the lack of showing of citizenship. He erred in both respects. The motion belongs on the criminal side, in the original case. See Heflin v. United States, 358 U.S. 415, 418 n. 7; Cook v. United States, 1 Cir., 171 F 2d 367, cert. den., 336 U.S. 926; Ekberg v. United States, 1 Cir., 167 F. 2d 380. The clerk is directed to make the transfer.[1] I proceed to the merits.

[fol. 33] 1. The first ground of the motion is that the sentence was announced orally by the clerk; following a

[1] With respect to the lack of allegation of citizenship, I note that defendant has previously filed such an affidavit in this court. Since I judicially know he has been in Alcatraz ever since, I will not assume that he has changed his citizenship, but will assume a continuance of status. However, this is now moot, as no filing fee is required on the criminal side.

conference off the record between the clerk and the court. Defendant states that the judge, (not the present writer), should have spoken himself, rather than the clerk for him. It is not alleged that the judge was not physically present on the bench, and I of course assume that he was. It is common practice for a sentence to be imposed in this fashion. The clerk was performing a ministerial function only, in the presence and at the direction of the court, and the words are the court's. There is no merit in this contention of the defendant.

2. The second ground alleged is, "The judge and the clerk conferred on the length of the sentence out of the hearing of the court reporter and the defendant." The transcript, so far as this matter is concerned, is accurately set forth in the motion. It merely shows, "(The court and clerk confer)." There is nothing improper with the court conferring with the clerk at any time. I will not assume, in the absence of any showing, and none is suggested, that at this conference anything took place other than that the court instructed the clerk as to the sentence to be announced. What I have already said on point one takes care of that matter.

3. The only claim worthy of any extended discussion is the allegation that "the judge did not afford the de- [fol. 34] fendant an opportunity to speak before imposition of the sentence as required by Rule 32(a) Fed. Rule Crim. Proc." In his motion the defendant does not adequately set forth any factual basis for this statement. I will, however, in the interest of saving time, since doubtless the motion could be amended, take note of the transcript which was filed in connection with defendant's original appeal, as the record herein. This shows that counsel addressed the court, and thereafter sentence was pronounced as aforesaid.

Rule 32(a) provides that "the court shall afford the defendant an opportunity to make a statement in his own behalf." It has been suggested that this requires the court affirmatively to ask defendant whether he wishes to say anything himself. See Couch v. United States, D.C. Cir., 235 F. 2d 519. Even in that case the court applied this principle prospectively only, and not to in-

validate a sentence already imposed. See Howard v. United States, D.C. Cir., 247 F. 2d 537. Personally, it seems to me difficult to say where the court listened to counsel, and there was no indication that it was not equally prepared to listen to the defendant as well, that the court did not "afford the opportunity" to speak simply because it did not invite it. When defendant is not represented by counsel he should of course be informed of his right by being so invited. I question whether a defendant competently represented should need this instruction from the court. If the framers of the rule felt otherwise, they could have used the affirmative word "offer," rather than the passive "afford".[2]

[fol. 35] In any event, I subscribe to what was said in United States v. Miller, D.C.S.D.N.Y., 158 F. Supp. 261, at 264, that "the defendant has not shown that if he had been offered the opportunity to speal in person he would have added anything to that which his counsel already had said . . ." It is not without significance that the defendant was sentenced in 1952, and this is the first time he has made this complaint, although he has made many others previously, in 28 U.S.C.A. § 2255 proceedings. Even now he does not say that he wanted to say anything at the time, or what he would have said.

The defendant's motion to vacate sentence is denied. I see no reason to allow his attendant motion to appoint counsel for him. However, since he has no counsel I instruct the clerk to mail him a copy of this opinion forthwith by airmail, and I advise him if he wishes to appeal it is possible he may have only ten days to file.

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[2] The analogy suggested by Judge Fahy in the Couch case that a defendant must be personally present during trial, and cannot be represented simply by counsel, does not seem to me apposite. There are much broader reasons for that. I must admit, however, that on occasion I have inquired of a defendant even though represented by counsel, whether he personally wished to say anything in his own behalf. This "admission" on my part may be inconsistent with my pronouncement that such inquiry is not a necessary action. If it seems desirable in some cases, perhaps it should be done in all. The fact that the defendant almost invariably declines the invitation is, of course, immaterial to the present question.

plus such further time as the Court of Appeals might extend to him because of his distance from the District. See Rules 37, 45(b) and (e), Federal Rules of Criminal Procedure, 18 U.S.C.A.; compare Gonzalez v. United States, 354 U.S. 978 (per curiam), reversing 1 Cir., 233 F. 2d 825, with Heflin v. United States, supra.

s/ Aldrich
U.S.D.J.

[fol. 36] IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS

Case No. Cr. 52-130

AFFIDAVIT IN FORMA PAUPERIS—Filed June 22, 1959

Theodore Green, having been sworn according to law deposes and says as follows in support of his motion.

1. That he is currently serving 26 years 7 months and 2 day term for violation of Title 18 Section 2113, U.S.C.

2. That he is a layman unschooled at law and prepared his moving papers in this court.

3. That he is a citizen of the United States by birth and a poor person within the meaning of Section 1915 (a) Title 28, United States Code.

4. That he is proceeding in this court in forma pauperis.

5. That the motion presents questions of law unsettled in the First Circuit.

6. That he is appealing this motion to the United States Court of Appeals in good faith because he verily believes that he has a meritorious cause.

WHEREFORE, petitioner prays that he be permitted to appeal from the Order of June 15, 1959, denying motion filed under Rule 35, Federal Rules Of Criminal Procedure.

Respectfully submitted

Subscribed and sworn before me this 18th day of June 1959.

Associate warden
U.S. Penitentiary, Alcatraz

[fol. 37] IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

No. Case. Cr. 52-130

UNITED STATES OF AMERICA

vs

THEODORE GREEN

NOTICE OF APPEAL—Filed June 22, 1959

Name and address of Appellant—Theodore Green, Box 1180, Alcatraz Calif.

Concise statement of judgment—25 years on verdict of guilty for violation of Title 18, Section 2113.

Order appealed from—Denial of motion filed under Rule 35.

Date of order—June 15, 1959 (received by appellant 5:00 P.M. June 17 1959)

Name of judge—Honorable B. Aldrich.

Notice is hereby given of appeal of the above designated ORDER to the United States Court of Appeals for the First Circuit.

Theodore Green
1180 Alcatraz Calif.

[fol. 38]

IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5547

THEODORE GREEN, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Appeal from the United States District Court for the District of Massachusetts

Before WOODBURY, *Chief Judge*, HARTIGAN, *Circuit Judge*, and GIGNOUX, *District Judge*

Theodore Green, pro se, on brief for appellant.

Elliot L. Richardson, United States Attorney, and *William J. Koen*, Assistant U. S. Attorney, on brief for appellee.

OPINION OF THE COURT—December 8, 1959

PER CURIAM. Theodore Green, who is at present serving a sentence of 25 years' imprisonment for bank robbery in violation of Title 18 U.S.C. § 2113 and who has wasted the time of this court before by fruitless appeals, see *Green* v. *United States*, 238 F.2d 400 (1956), and *Green* v. *United States*, 256 F.2d 483 (1958), *cert. denied* 358 U.S. 854 (1958), moved in the court below under Criminal Rule 35 to be resentenced for the following reasons: 1) the judge did not orally pronounce sentence from the bench himself but permitted the clerk to do so, 2) the judge, before sentence, conferred with the clerk, it is asserted as to the length of the sentence to be im-
[fol. 39] posed, out of the hearing of the court reporter and the defendant, 3) the judge did not afford the defendant personally an opportunity to speak in his own behalf before the imposition of sentence as required by Criminal Rule 32(a). The District Court denied the motion and Green thereupon took the present appeal.

There is little for this court to say except that we endorse the views expressed by the court below in its opinion reported 24 F.R.D. 130 (1959).

The record shows that the judge was on the bench when, as is the common practice, at least in this circuit, sentence was announced orally by the clerk. And we wholly agree with the court below that in announcing the sentence the clerk was only performing a ministerial function in the presence and at the direction of the court so that actually the words of the clerk were the words of the court. We are not aware of any reason whatever why a judge cannot direct the clerk to speak for the court in announcing sentence. The cases relied upon by the appellant are so out of point that it would be a waste of time to distinguish them.

The appellant's second contention is wholly without substance. It is certainly not improper for the court to confer with the clerk at any time. Nor is there anything in the record to indicate that the object of the court's conference with the clerk before sentence was imposed was other than for the court to tell the clerk the sentence he was to announce.

As to the third contention, it appears that Green was represented at his trial by an able and experienced criminal trial lawyer of his own choice, see *Green* v. *United States*, 256 F.2d 483, 484 (C.A. 1, 1958), and that counsel addressed the court at considerable length in mitigation of punishment before sentence was imposed.

Perhaps, as suggested by the court below, it might be better practice in all cases for the court before passing sentence to ask the defendant personally if he wished to [fol. 40] make a statement in his own behalf or present any information in mitigation of punishment. See *Couch* v. *United States*, 235 F.2d 519 (C.A.D.C., 1956). At least, that procedure would prevent any question of compliance with Criminal Rule 32(a) from ever arising. But we are certainly not prepared to say that the Rule requires personal solicitation of a defendant to speak in his own behalf when he is represented by competent and experienced counsel of his own choice, when counsel has had a full opportunity to speak and has spoken at length for

his client in mitigation of punishment, and has been allowed to present any information there may be bearing on that matter. Moreover, there is nothing in the record to show that Green, either personally or through his counsel, asked to speak in his own behalf or requested permission to add anything to what his counsel had said. Nor is there any indication in the present motion or the supporting brief as to what, if anything, Green might have been able to add in elaboration of the statements of his counsel.

Judgment will be entered affirming the judgment of the District Court.

[fol. 41] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

• • • • •

JUDGMENT ENTERED DECEMBER 8, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was submitted on brief for appellant, record appendix thereto and brief for appellee by leave of Court.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Approved:

/s/ PETER WOODBURY, C.J.

Thereafter, on December 24, 1959, mandate issued and the original papers were returned to the District Court.

• • • • •

[fol. 42] SUPREME COURT OF THE UNITED STATES

No. 596 Misc. ——, October Term, 1959

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 18, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question No. 3 presented by the petition which reads as follows:

"3. Whether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before sentence was imposed."

The case is transferred to the appellate docket as No. 870 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960 564980 310